

STATE OF TEXAS,
Plaintiff,

v.

BALLY TOTAL FITNESS
CORPORATION
Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, T E X A S

261st JUDICIAL DISTRICT

AGREED FINAL JUDGMENT AND PERMANENT INJUNCTION

On this date came on for hearing in the above entitled and numbered cause in which the State of Texas (hereinafter "State"), acting by and through Attorney General of Texas, Greg Abbott, is Plaintiff and Bally Total Fitness Corporation (hereinafter "Bally") is the Defendant. Through their respective attorneys of record, Plaintiff and Defendant agree to the entry of this Agreed Final Judgment and Permanent Injunction (hereinafter "Final Judgment").

I.

STIPULATIONS

The parties wish to make the following stipulations:

1.1 That they agree to the entry of this Final Judgment;

1.2 That they have compromised and settled all claims alleged by the State of Texas in its petition;

1.3 That Bally's agreement to enter into this Judgment is not an admission of liability and shall not be construed to be an admission or as evidence that Bally has violated any state or federal law, rule, or regulation;

1.4 That this Court has Jurisdiction over the subject matter of this action and over the Defendant for the purpose of entering into and enforcing this Judgment;

1.5 It appearing to the Court that all parties agree to the entry of this Judgment and that they have approved its entry by their duly authorized signatures and the signatures of their respective attorneys below, the Court, after review of the stipulations of the parties and after being fully advised in this matter, finds as follows:

- a. That it has jurisdiction of the parties and subject matter of this suit;
- b. That the settlement of this dispute is fair, reasonable, and just; and
- c. That it would be in the best interests of the parties if the Court approved the settlement and rendered judgment accordingly.

II.

DEFINITIONS

2.1 For purposes of this Final Judgment, the following definitions shall apply:

- a. "Collection Letter" means a written communication sent by Bally on or before the date of this Judgment in which Bally incorrectly represented to Value Plan Members that they owed a past due amount or had a continuing obligation to make payments to Bally when in fact they did not. An example of a Collection Letter is attached hereto as Exhibit A.
- b. "Value Plan member" refers to Bally members residing in the State of Texas who purchased a membership contract for a set term of months with a renewal option at the conclusion of the original term, which in the

instant case had expired at the time Bally sent a Collection Letter to the member.

III.

INJUNCTION

3.1 IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant, its officers, agents, employees, or any entity or department owned, operated, controlled, or managed by Defendant, shall be permanently enjoined from engaging in the following acts or practices:

- a. Representing to current and / or former members – orally or in writing– that a debt or “past due” balance is owed to Bally unless the representation is true at the time the representation is made;
- b. Taking any steps to collect monies from any member or former member who received the Collection Letter unless Defendant has a documented basis for asserting that the member in fact owes money to Defendant;
- c. Representing to a consumer that negative information will or may be submitted by Bally to a credit bureau when Bally’s records demonstrate that at the time the representation was made Bally had no basis in fact for issuing a negative credit report;
- d. Engaging in any conduct to collect monies from consumers who previously have provided Bally with notice of cancellation in accordance with their contractual agreements, unless Defendant has a documented basis which demonstrates that the consumer continues to owe money to Defendant pursuant to the terms of a contract; and

- e. Submitting negative information to any of the credit bureaus for any of the Defendant's current or former customers unless Bally has a documented basis for submitting such information.

3.2 Nothing in the preceding paragraph 3.1 shall prohibit Bally from lawfully disclosing to a consumer that consequences of non-payment of an existing obligation may lead to Bally providing negative information to a credit bureau or prohibit Bally from meeting its obligations under applicable debt collection laws or regulations.

IV.

RESTITUTION

4.1 No later than 60 (sixty) days after the date this Judgment is entered by the Court, Defendant shall send a Written Notice (Notice) by first class mail to all consumers to whom it sent Collection Letters after January 1, 2010, informing consumers of the following:

- a. That the Collection Letter previously sent to them was sent in error;
- b. That at the time such letter was sent to the recipient, the recipient did not (i) owe Bally a past due amount and (ii) had no financial obligation to make a payment to Bally; and
- c. That neither Bally nor its agents have submitted or will submit negative information regarding this Collection Letter to a credit bureau or collection agency.

4.2. Those consumers who responded to Bally's Collection Letter by making a payment to Bally shall be eligible for restitution as further described in paragraphs 4.3

and 4.4 below. Defendant will send to each of these consumers the Notice described in the preceding paragraph 4.1 together with the information included below in paragraphs 4.3 and 4.4 as applicable. Defendant shall send these consumers their Notices and refund checks, if applicable, within 60 days of the date the Judgment is entered by the Court.

4.3 Consumers who Paid Monies and Did Not Use Facilities: Consumers who responded to Bally's Collection Letter by making a payment to Bally but did not use Bally's health spas between the time period that they received the "Collection Letter" and the day this Judgment is entered by the Court, will receive a full refund, if not already provided by Bally, of all monies paid from the date of the Collection Letter through the date of the Notice.

- a. Bally shall further inform consumers described in this paragraph that, as a result of a settlement with the Texas Attorney General's office, the consumer is receiving a full refund of monies paid to Bally after the date of the Collection Letter.
- b. If Bally's records reflect that after receipt of the Collection Letter the affected consumer entered into a new written agreement with Bally, the Notice will further inform the consumer that the consumer may terminate, at the consumer's choice, his/her contract with Bally without penalty by sending a certified letter requesting cancellation of his/her contract to the following address: **Earl Acquaviva, 300 E. Joppa Road, Suite 703, Towson, MD 21286.** The Notice will also explain to consumers that if they decide to cancel pursuant to the offer in the Notice that they must do so

within 30 (thirty) days of the date they received the Notice. The Notice will further explain to the consumers that if they choose not to cancel their contracts pursuant to the offer in the Notice they continue to have their contract cancellation rights as provided under their written agreement with Bally.

4.4 Consumers who paid monies and used Bally's health spas after such payment: With respect to those consumers who responded to Bally's Collection Letter by making a payment to Bally and subsequent to such payment, utilized Bally's health spas on three or fewer occasions, the Notice shall further inform consumers that as a result of the settlement with the Office of the Texas Attorney General the consumer will receive reimbursement, to the extent not already provided by Bally, equal to the amount paid by the consumer but not to exceed the amount that Bally had designated as due in the "Collection Letter" that was previously sent in error.

4.5 Consumers who file complaints: In the event that the Attorney General's office receives complaints from consumers who received Collection Letters, and who alleged they made a payment in response to the Collection Letters but whose facts do not fall within the categories described in the preceding paragraphs, the Attorney General will forward such complaint to Bally which shall provide a written response to the Attorney General within 20 business days of receipt of such complaint. In the event that the consumer's complaint includes a request for a refund of monies paid and Bally's response asserts that no refund is due such consumer, Bally shall include with its response to the Attorney General documentation in support of its denial.

4.6 In the event that the Attorney General's office receives complaints from consumers who received restitution as described above in which those consumers assert that the amounts they received were in error, the Attorney General will forward such complaint to Bally which shall provide a written response to the Attorney General within 15 business days of receipt of such complaint. In the event that Bally's response asserts that no further refund is due such consumer, Bally shall include with its response to the Attorney General documentation in support of its denial.

4.7 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that on or before December 1, 2010, the Defendant shall submit a report to the Office of the Attorney General of Texas providing a list of all consumers who were sent a Notice pursuant to this Judgment and all consumers who received restitution pursuant to this Judgment. The report shall also include the amount of money that each consumer received from Bally in the form of restitution.

4.8 Any restitution checks which are returned to Bally uncashed shall be treated by Bally as "Unclaimed Funds," and such funds shall be treated by Bally as "Unclaimed Property" pursuant to Title 6 of the Texas Property Code (Unclaimed Property).

V. REPORTING AND COMPLIANCE

5.1 Defendant shall develop and implement procedures reasonably designed to ensure compliance by Defendant with the obligations contained in this Judgment and will designate a corporate level representative responsible for monitoring compliance with the terms of this Judgment. Further, Defendant shall provide a copy of this Judgment and an accurate summary of the material terms of this Judgment to its senior

executive officers who have managerial responsibility for the matters subject to this Judgment.

5.2 Upon written request, Defendant will provide the Attorney General with proof it has complied with the provisions set forth in paragraph 5.1 within 30 days of the request.

5.3 In the event that Defendant sends Texas consumers notices incorrectly representing to consumers that they have a past due account with Defendant, the Defendant shall, immediately upon learning of such error, provide notice of such to the Office of the Attorney General. The notice shall be sent to the following address: Office of the Attorney General of Texas, Chief of Consumer Protection Division, P. O. Box 12548, Austin, Texas 78711-2548 and must include a copy of the letter(s) and report on the number of consumers to whom these letters were mailed.

VI.

ATTORNEYS' FEES

6.1 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the State of Texas shall have judgment against Defendant in the amount of \$125,000 (One Hundred Twenty Five Thousand Dollars) for its attorneys' fees and costs as provided by Section 402.006 (c) of the Texas Government Code. Payment to the State of Texas is due on or before August 27, 2010.

VII.

GENERAL PROVISIONS

7.1 Defendant is entering into this Judgment solely for the purpose of settlement and nothing contained herein may be taken as or construed to be an admission

or concession of any violation of law or regulation, or of any other matter of fact or law, or of any liability or wrongdoing, all of which Defendant expressly denies. Defendant does not admit any violation of the State's Consumer Protection Laws, and does not admit any wrongdoing that was or could have been alleged by the Attorney General before the date of the Judgment under those laws. By entering into this Final Judgment and agreeing to the terms and conditions provided herein, Bally does not intend to waive, and does not waive, any defenses it may have in any other action or proceeding that has been or may be brought against it by any person, entity and/or agency arising from the subject matter of this Final Judgment. Further, to the extent that any changes in Bally's business, advertising materials, and/or advertising or customer service practices are made to achieve or to facilitate conformance to the terms of this Final Judgment, such changes shall not constitute any form of evidence or admission by Bally, explicit or implicit, of wrongdoing of failure to comply with any federal or state statute or regulation or the common law.

7.2 This Judgment constitutes a complete settlement and release by the State of all claims alleged in Plaintiff's Original Petition against Defendant, and its successors, employees, officers, directors and assigns.

7.3 This Judgment shall be governed by the law of the State of Texas.

7.4 Defendant represents that it has fully read and understood this Judgment, it understands the legal consequences involved in signing this Judgment, and there are no other representations or agreements between Defendant and the Attorneys General not stated in writing herein.

7.5 Defendant represents and warrants that it is represented by legal counsel, that it is fully advised of its legal rights in this matter and that the person signing below is fully authorized to act on its behalf.

7.6 This Judgment shall bind Defendant and shall be binding on any and all of its successors, employees, officers, directors, and assigns.

7.7 Neither Defendant nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Attorney General has approved, sanctioned, or authorized any practice, act, advertising material, or conduct of Defendant.

7.8 Nothing in this Judgment shall be construed as a waiver of, or limitation on, Defendant's right to defend itself from or to make agreements in any private individual or class action, state, or federal claim, suit or proceeding relating to the existence, subject matter or terms of this Judgment.

7.9 Nothing in this Judgment shall be construed to create, affect or deprive any private right of action that any consumer, person, entity, or by any local, state, federal or other governmental entity, may hold against Defendant, except as otherwise provided by law.

7.10 The titles and headers to each section of this Judgment are for convenience purposes only and are not intended by Defendant or the Attorney General to lend meaning to the actual terms of this Judgment.

7.11 Nothing in this Judgment shall limit or expand the Attorney General's right to obtain information, documents, or testimony from Defendant pursuant to any state or federal law or regulation.

7.12 If any clause, provision or section of this Judgment shall, for any reason, be held illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect any other clause, provision or section of this Judgment, and this Judgment shall be construed and enforced as if such illegal, invalid or unenforceable clause, section or provision had not been contained herein.

7.13 If the State receives a public information request for documents provided to the State by Bally relating to the investigation or subject matter of this Judgment or any reports specified or required herein, the State shall comply with the Texas Public Information Act ("the Act") and promptly provide Bally with notice of such request if required by the Act. Bally has asserted that such documents include confidential commercial and proprietary information and has, or will, specifically designate such documents accordingly.

7.14 If the Attorney General determines that Defendant has failed to comply with any of the terms of Paragraph III of this Judgment, and if the failure to comply does not threaten the health or safety of the citizens of the State of Texas and/or does not create an emergency requiring immediate action, the Attorney General will notify Defendant in writing of such alleged failure to comply and Defendant shall then, within fifteen (15) business days from receipt of such written notice, provide a good faith written response to the Attorney General. Any such response shall include either:

- a. A statement explaining why Defendant believes it is in full compliance with and/or not in violation of Section III of this Judgment; or

- b. A statement of how the alleged violation(s) may have occurred;
and
 - i. A statement that the alleged breach has been cured and how it has been cured; or
 - ii. A statement that the alleged breach cannot be reasonably cured within fifteen (15) business days from receipt of the written notice, but (1) Defendant has begun to take corrective action to cure the alleged breach; (2) Defendant is pursuing such corrective action with reasonable care and due diligence; and (3) Defendant has provided the Attorney General with a reasonable time table for curing the alleged breach. The State will not take action against Defendant during the fifteen (15) business day period from Defendant's receipt of the written notice unless in the Attorney General's sole discretion a threat to the health or safety of the public, or other emergency, requires immediate action. Further, after receipt of Bally's response, the State will, to the extent practicable, agree to confer with Bally if a request to confer is made.

7.15 Any failure by any party to this Judgment to insist upon the strict performance by any other party of any of the provisions of this Judgment shall not be deemed a waiver of any of the provisions of this Judgment, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific

performance of any and all of the provisions of this Judgment and the imposition of any applicable penalties, including but not limited to contempt, civil penalties and/or the payment of attorneys fees to the State.

7.16 This Judgment sets forth the entire agreement between the parties, and there are no representations, agreements, arrangements, or understandings, oral or written, between the parties relating to the subject matter of this Judgment which are not fully expressed herein or attached hereto.

7.17 This document may be executed in any number of counterparts and by different signatories on separate counterparts, each of which shall constitute an original counterpart hereof and all of which together shall constitute one and the same document. One or more counterparts of this Judgment may be delivered by facsimile or electronic transmission with the intent that it or they shall constitute an original counterpart thereof.

7.18 Jurisdiction is retained by this Court for the purpose of enabling either party to apply to this Court for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Judgment, including the enforcement of compliance therewith and penalties for violation thereof.

7.19 Any notices required by this judgment to be sent to the State or Bally shall be sent to the persons designated below by United States certified mail, return receipt requested, or other nationally recognized courier service that provides for tracking services and identification of the person signing for the document. The documents shall be sent to the following addresses:

For the State of Texas:

Pedro Perez, Assistant Attorney General
Office of the Attorney General
Consumer Protection Division
Post Office Box
Austin, Texas
Telephone: (512) 475 4656

For BALLY:

Clayton S. Friedman
Manatt, Phelps and Phillips
695 Town Center Drive
Fourteenth Floor
Costa Mesa, CA 92626

With copy to:

Bally Total Fitness Corporation
Attn: General Counsel
8700 W. Bryn Mawr Avenue
Chicago, IL 60631

Any party may designate a different individual to receive the notices required to be sent by sending written notification to the other parties at least thirty (30) days before such change will occur identifying that individual by name and/or title and mailing address.

7.20 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the State of Texas shall have all writs of execution and other process necessary to enforce this Final Judgment.

7.21 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of court incurred in this case are taxed against the Defendant.

7.22 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all relief not expressly granted herein is denied.

SIGNED this _____ day of _____, 2010.

PRESIDING JUDGE

AGREED AS TO SUBSTANCE AND FORM AND ENTRY REQUESTED:

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Litigation

PAUL D. CARMONA
Chief, Consumer Protection & Public Health
Division

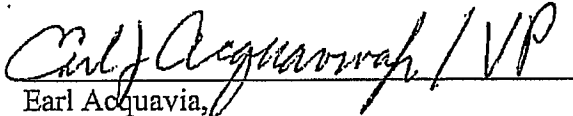
Pedro Perez Jr. with permission N.M.D.
PEDRO PEREZ, JR.
Assistant Attorney General
State Bar No. 00788184
Office of the Attorney General
Consumer Protection and Public Health
Division
P.O. Box 12548
Austin, Texas 78711
512-475-4656
(FAX) 512-477-4544

**ATTORNEYS FOR THE STATE OF
TEXAS**

AGREED AS TO FORM AND SUBSTANCE AND ENTRY REQUESTED:

BALLY TOTAL FITNESS CORPORATION

By:

Handwritten signature of Earl Acquavia, followed by a horizontal line.

Earl Acquavia,
Vice President and Associate General Counsel,
Bally Total Fitness Corporation

Paul N. Wageman
Winstead Sechrest Minick PC
Attorneys at Law
Texas Bar No. 00786317
1201 Elm St., Ste 5400
Dallas, Texas 75270-2144
214-745-5173
214-745-5390 (fax)

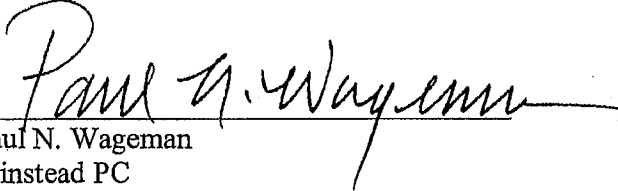
**ATTORNEYS FOR DEFENDANT
BALLY TOTAL FITNESS CORPORATION**

AGREED AS TO FORM AND SUBSTANCE AND ENTRY REQUESTED:

BALLY TOTAL FITNESS CORPORATION

By:

Earl Acquavia,
Vice President and Associate General Counsel,
Bally Total Fitness Corporation



Paul N. Wageman
Winstead PC
Attorneys at Law
Texas Bar No. 00786317
1201 Elm St., Ste 5400
Dallas, Texas 75270-2144
214-745-5173
214-745-5390 (fax)

**ATTORNEYS FOR DEFENDANT
BALLY TOTAL FITNESS CORPORATION**

Exhibit A



BALLY
TOTAL FITNESS®

Bally Total Fitness
12440 Imperial Hwy, Ste 300
Norwalk, CA 90650-8309

ballyfitness.com

Membership Number REDACTED	Date 02-17-2010	Please Respond By 03-09-2010
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\$12

REDACTED

SAN ANTONIO TX 78240



Current Month Dues: **\$32.43**

Prior Monthly Dues: **\$244.55**

Total Dues Amount: **\$276.98**

Your account is 45 days past due. Unfortunately, until your account is brought current, you will be unable to work out at the club. To continue your membership and avoid future start up fees, please pay \$276.98.

We understand that sometimes life can get in the way of your commitment to health and fitness. However, BallySM is a great value in fitness and we want to see you back in the club.

If your intent is to cancel your membership, please bring your account current by paying your Total Dues Amount of \$276.98 today and include written notice of your request to cancel. Please send written correspondence including your email and mailing address to the address listed below.

Please do not include correspondence with your payment. All inquiries or cancellation requests should be addressed to:
Bally Total Fitness, P.O. Box 1090, Norwalk, CA 90650. Telephone: 1-866-402-2559

When you provide a check as payment, you authorize us either to use information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction. When we use information from your check to make an electronic fund transfer, funds may be withdrawn from your account as soon as the same day we receive your payment, and you will not receive your check back from your financial institution. If you prefer not to have your checks processed as an electronic fund transfer please call 888-889-5365 with your 13 digit Bally account number at least 10 days prior to mailing your next check to Bally.

Membership Number REDACTED	Please Respond By 03-09-2010	Amount Enclosed
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REDACTED

SAN ANTONIO TX 78240

☐ Charge My Amount Due **\$276.98**

☐ I Want To Save Time and Money. Please Enroll Me In The
Electronic Bill Payment Program From My Credit Card Listed
Below.

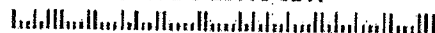
☐ Visa ☐ MC ☐ AmEx ☐ Discover ☐ Check

Account Number

Exp. Date /

Signature _____

BALLY TOTAL FITNESS
PO BOX 96241
WASHINGTON DC 20090-6241



REDACTED